

**ORIGINAL**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )

Amendment of Section 73.202(b) )

FM Table of Allotments, )

FM Broadcast Stations. )

(Athens and Doraville, Georgia) )

MB Docket No. 03-190

RM-10738

To: Assistant Chief, Audio Division  
Media Bureau

*[Handwritten signature]*  
SECRETARY

**REPLY COMMENTS  
OF COX RADIO, INC. AND CXR HOLDINGS, INC.  
RECEIVED**

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## SUMMARY

In this proceeding, Cox Radio, Inc. and CXR Holdings, Inc. (collectively, "Cox") have proposed to provide Doraville, Georgia, with its first local service by reallocating WBTS(FM), Channel 238C1, from Athens to Doraville. As detailed in Cox's Petition for Rulemaking and in these Reply Comments, a *Huntington/Tuck* analysis demonstrates that Doraville is independent from the Atlanta Urbanized Area, and as such, merits a first local service preference. Accordingly, the reallocation of WBTS(FM) to Doraville would fulfill Priority 3: first local service. In contrast, retention of the allotment at Athens would provide Athens with an eighth local service and Doraville with no local service. Thus, under the Commission's well-established policies and precedent, Cox's proposal should be granted because it achieves a preferential arrangement of allotments.

Only one party has opposed Cox's Doraville Proposal. However, that party, Infinity Broadcasting Corporation, has not offered a counterproposal for the FCC's consideration. Instead, Infinity attempts to obstruct the proposed provision of first local service to Doraville by making arguments regarding multiple ownership, hypothetical technical facilities, and station operations that are irrelevant to the FCC's long-established methodology for analyzing FM allotment proposals. The FCC's precedent governing FM allotment cases is clear, and Infinity has presented nothing that requires the Bureau to consider issues that are outside the scope of an allotment proceeding. Cox has demonstrated that Doraville is independent and therefore merits a first local service preference, and Cox proposes to provide Doraville with a first local service while maintaining local service in Athens. Therefore, under the FCC's precedent, Cox's proposal should be granted as serving the public interest.

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To: Assistant Chief, Audio Division  
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**REPLY COMMENTS  
OF COX RADIO, INC. AND CXR HOLDINGS, INC.**

Cox Radio, Inc. and its wholly owned subsidiary, CXR Holdings, Inc., licensee of radio station WBTS(FM), Channel 238C1, Athens, Georgia (collectively "Cox"), by their attorneys, hereby submit these Reply Comments pursuant to the above-captioned *Notice of Proposed Rule Making* ("Notice") released by the FCC on September 5, 2003. The *Notice* seeks comment on Cox's request, as set forth in its *Petition for Rule Making* dated May 9, 2003 ("*Petition*"), that the FCC amend the FM Table of Allotments by reallotting Channel 238C1 from Athens to Doraville, Georgia, as the community's first local transmission service and modifying WBTS(FM)'s authorization accordingly (the "Doraville Proposal"). On October 24, 2003, Cox timely filed comments supporting the *Notice* and confirming its continuing interest in the Doraville Proposal.

Only one other party, Infinity Broadcasting Corporation (“Infinity”), filed comments in this proceeding.<sup>1</sup> In its Comments, Infinity challenges the Doraville Proposal but barely discusses the proposal’s actual merits. Instead, perhaps because Doraville so plainly deserves a first local service preference, Infinity attempts to convince the FCC to focus on matters that are utterly irrelevant to the instant proceeding such as Cox’s other media holdings, potential cross-ownership issues, hypothetical technical studies, and WBTS’s station operations. In its effort to confuse the narrow question before the Bureau – whether Doraville qualifies as a community deserving of a first local service preference – Infinity elaborately strings together irrelevancies, speculations and unsupported accusations. The Bureau should turn down Infinity’s invitation to disregard its existing policies and precedents and should refuse to expand the instant allocation proceeding into a review of media ownership and broadcast marketing practices.

Tellingly, Infinity does not provide the FCC with a counterproposal that might improve upon the Doraville Proposal or provide a preferential arrangements of allotments. Rather, Infinity seeks only to block the provision of first local service to Doraville, which, as further demonstrated herein, is eminently qualified for a first local service preference. As such, Cox urges the Bureau to disregard Infinity’s misguided and misleading Comments. As demonstrated in the Petition and further demonstrated herein, Doraville is independent of Atlanta and qualified for a first local service preference. The Bureau therefore should review the Doraville Proposal under Priority 3 (as described herein) and grant the Petition.

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<sup>1</sup> Comments of Infinity Broadcasting Corp., filed in MB Docket No. 03-190, RM-10738 on Oct. 27, 2003 (“Infinity Comments”).

**I. INFINITY'S ATTEMPTS TO OBFUSCATE THE PROCEEDING MUST BE IGNORED.**

Cox's *Petition* demonstrates that the Doraville Proposal fully complies with the Communications Act and Commission rules and policies. In tacit acknowledgment of this fact, Infinity piles on speculation, innuendo, and unsupported accusations in an effort to convince the Bureau to focus on anything other than the plain facts of the instant proceeding. Infinity elaborately discusses Cox's other media interests, its compliance with the FCC's ownership rules and the operations of WBTS – none of which is remotely relevant to the question presented in the instant case. The Bureau should ignore Infinity's attempts to infuse extraneous issues into this proceeding and should grant the Doraville Proposal promptly.

**A. Cox Is In Full Compliance With The Commission's Media Ownership Rules in The Greater Atlanta Area.**

Infinity begins by attempting to argue that media ownership limitations should be considered during an allotment proceeding. To this end, Infinity details Cox's media holdings in the Atlanta area but glosses over the fact Cox is in complete compliance with the FCC's current media ownership rules.<sup>2</sup> Moreover, if and when the FCC's new ownership rules go into effect, Cox will remain in compliance. In fact, because Cox holds just five stations (one AM and four FMs) in the Atlanta market, the new ownership rules would permit Cox ownership of an

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<sup>2</sup> As Infinity discusses, Cox's Atlanta area newspaper and broadcast holdings comply with the Commission's newspaper/broadcast cross-ownership rule (47 C.F.R. § 73.3555(d)) because Cox's common ownership of WSB-TV, WSB(AM), WSB-FM and Cox's Atlanta newspapers are grandfathered and the Commission granted a temporary waiver of the rule with respect to WALR-FM. *See* Infinity Comments at 2-3. Contrary to Infinity's assertions, Cox does not require a waiver of the newspaper/broadcast cross-ownership rule with respect to its ownership of WFOX(FM), because WFOX(FM)'s 1 mV/m contour does not, in fact, encompass Atlanta. *See* Letter from Elizabeth A. McGeary, Esq. to Magalie Roman Salas, Esq., Secretary, Federal Communications Commission (Oct. 6, 2000).

*additional* Atlanta market FM radio station and *two* additional Atlanta market AM radio stations – even when WBTS is included as an Atlanta market station.<sup>3</sup> Undaunted, Infinity breathlessly declares that *if* Cox’s holdings were not grandfathered, and *if* it did not have its current waivers, and *if* WBTS relocated, Cox would be in violation of the newspaper/broadcast cross-ownership rule. In other words, if the facts were completely different from reality, Cox would be in violation of a rule the Commission recently decided is no longer in the public interest.<sup>4</sup>

All of this obscures a more fundamental truth – Cox’s other media holdings are not relevant to the Doraville Proposal. Approval of a change of community of license for WBTS requires examination of just one Cox radio station: WBTS. As Infinity admits, Cox’s ownership of WBTS is in compliance with the Commission’s multiple ownership and cross-ownership rules and, because the Doraville Proposal does not include any change in facilities, a grant of the Doraville Proposal will not affect the station’s status with respect to those rules.<sup>5</sup> Moreover, the FCC has plainly and repeatedly held that ownership issues are not taken into consideration in allotment proceedings.<sup>6</sup> Accordingly, Cox’s Atlanta area holdings are irrelevant to this proceeding and Infinity’s musings to the contrary should be ignored.

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<sup>3</sup> According to *BIA Investing in Radio 2003*, the Atlanta, Georgia, market includes seventy-one commercial radio stations. Accordingly, one owner may own up to eight commercial radio stations, not more than five of which may be of the same service. In addition, the new ownership rules also would permit common ownership of up to two television stations, not more than one of which may be a top-four ranked station, along with newspaper interests. See 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules, *Report and Order and Notice of Proposed Rulemaking* in MB Docket 02-277, 18 FCC Rcd 13620, ¶¶ 134, 287, 330, 371 (rel. Jul. 2, 2003) (“*Media Ownership R&O*”).

<sup>4</sup> *Media Ownership R&O* at ¶ 330

<sup>5</sup> Infinity Comments at 5.

<sup>6</sup> See *Detroit Lakes and Barnesville, Minn.*, 17 FCC Rcd 25055 (2002) (“In order to achieve an efficient and orderly transaction of both the rulemaking process and the subsequent application  
Cont’d

**B. The Bureau Must Deny Infinity's Attempts to Invent New Licensee Requirements in the Context of Allotment Proceedings.**

Next, Infinity notes that, upon the grant of the Doraville Proposal, Cox could file a minor change construction permit application that would implicate the newspaper/broadcast cross-ownership rule (assuming such a rule still exists at that time).<sup>7</sup> As Infinity should know, however, the instant rulemaking proceeding is not the correct forum for such a review. In the recent allotment case upholding FM radio station WFCB's change of community of license from Chillicothe, Ohio, to Ashville, Ohio, the FCC affirmed that the correct forum for such a review is the application to implement the reallocation – *not* the rulemaking proceeding.<sup>8</sup> In *Chillicothe*, the FCC stated that “in order to achieve an efficient and orderly transaction of both the rulemaking and the application process, any issue with respect to compliance with Section 73.3555 of the Rules will, consistent with existing policy, be considered in conjunction with the application to implement the reallocation.”<sup>9</sup> Thus, if Cox files an application to modify the facilities of WBTS, Cox will provide any required showings with respect to the newspaper/broadcast cross-ownership rule *at that time*. FCC precedent and policy thus wisely preclude the speculative and irrelevant review Infinity is asking for as part of this proceeding.

Infinity also attempts to muddle the proceeding with unsupported and irrelevant claims that a gain/loss analysis be conducted. No precedent supports Infinity's claim that the Bureau

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process, any issue with respect to compliance with Section 73.3555 of the Rules will be considered in connection with the application to implement this reallocation.”); *Carrizo Springs, Tex.*, 13 FCC 760 (1998) (“ownership and programming issues are not taken into consideration in an allotment proceeding.”).

<sup>7</sup> Infinity Comments at 6.

<sup>8</sup> *Chillicothe and Ashville, Ohio, Memorandum Opinion and Order* in MM Docket No. 99-322, DA 03-2442, 2003 FCC LEXIS 6060, ¶ 11 (rel. Oct. 31, 2003) (“*Chillicothe*”).

<sup>9</sup> *Id*



must, or even should, analyze a hypothetical gain and loss showing based on a hypothetical transmitter site move to a hypothetical location (of Infinity's choosing) that could be proposed in a hypothetical application filed after the close of the FM allotment proceeding. Even in *Chillicothe*, where the FCC considered the possibility of a two-step procedure, the FCC did not require the parties to provide a hypothetical gain/loss analysis, presumably because the FCC and the parties recognized that such a wildly speculative exercise would waste scarce FCC resources and be completely unworkable from a processing and policy standpoint. To impose such a requirement would dissolve any allotment proceeding into a fruitless task of engaging in an infinite number of suppositions as to where a petitioner could possibly relocate its facilities, at what height and at what power level.<sup>10</sup> The Bureau therefore should reject Infinity's extra-proceeding arguments.

**C. Even if They Were True, Infinity's Unsupported Innuendo and Allegations Are Irrelevant to This Proceeding.**

Finally, Infinity desperately attempts to confuse the proceeding though repeated insinuations that Cox operates WBTS in violation of the public interest, if not the FCC's rules. Infinity claims that WBTS "barely" meets the FCC's community of license coverage requirements for its community of license;<sup>11</sup> that the WBTS main studio ("or at least the cluster headquarters") is in Atlanta, not Athens;<sup>12</sup> and that WBTS is marketed as an Atlanta station and

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<sup>10</sup> Moreover, even a cursory analysis of Infinity's own hypothetical scenario demonstrates that the communities in the speculated loss area would have at least seven and up to fourteen aural reception services remaining and thus would be considered well-served. *See, e.g. Okmulgee and Glenpool, OK.*, 18 FCC Rcd 14370, ¶ 2 (2003) (stating that a community is considered to be well-served if it has at least five reception services).

<sup>11</sup> Infinity Comments at 3.

<sup>12</sup> *Id.* at 4.

accepts paid advertisements for Atlanta dance clubs!<sup>13</sup> Infinity even includes a CD that purports to record a problem with WBTS's station identification.<sup>14</sup> Infinity painstakingly documents each of these assertions in the apparent hope that the Bureau, after wading through dozens of pointless printouts, will somehow forget that Infinity's insinuations have no bearing on the merits of the Doraville Proposal.

The most serious of Infinity's accusations is that WBTS is failing to serve its community of license. However, in contrast to its exhaustive "evidence" of WBTS's marketing strategy, Infinity fails to provide a scintilla of evidence in actual support of its accusation.<sup>15</sup> Instead, Infinity merely reasons that because WBTS is marketed as an Atlanta station and accepts advertisements from Atlanta advertisers, Cox must have abandoned WBTS's community of license.<sup>16</sup> While Infinity's reasoning is obviously flawed, Cox suggests that, if marketing towards a nearby major city is "proof" of failing to serve a station's community of license, the FCC may begin its investigations with Infinity-owned WPGC, Morningside, Maryland; WARW, Bethesda, Maryland; and WJFK, Manassas, Virginia – all of which target Washington, DC, rather than their own communities of license.<sup>17</sup> Fortunately for Infinity, there is absolutely no precedent for examining a station's marketing strategy in connection with its service of the needs

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<sup>13</sup> *Id.*

<sup>14</sup> Cox disputes that its regular station identification for WBTS does not mention Athens, as Infinity claims.

<sup>15</sup> Infinity Comments at 9.

<sup>16</sup> *Id.* at 4.

<sup>17</sup> See WPGC at <http://www.WPGC955.com>, WARW at <http://www.classicrock947.com/index.shtml>, WJFK at <http://www.1067wjfk.com>.

and interests of its community of license.<sup>18</sup> Infinity's desperate denigrations of Cox's operations are simply an attempt to distract the Bureau from the business at hand. As the FCC has previously stated, such issues "are not properly raised in an allotment proceeding," and must be disregarded.<sup>19</sup>

**II. WHEN THERE IS A POTENTIAL FOR A TWO-STEP MOVE, FCC PRECEDENT REQUIRES A *TUCK* ANALYSIS WHICH COX ALREADY HAS PROVIDED.**

The FCC's policies governing FM allotments are straightforward, despite Infinity's attempts to obscure them. When reviewing a proposal to change a station's community of license, the FCC compares the proposed allotment plan and the existing state of allotments for the communities involved.<sup>20</sup> To determine whether a proposal would result in a preferential arrangement of allotments, the FCC is guided by its FM allotment priorities.<sup>21</sup> The FM priorities

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<sup>18</sup> See *Gerard A. Turro*, 15 FCC Rcd 560, ¶ 244 (ALJ 1999) ("there is no precedent for examining a station's local advertising rates or marketing strategy in connection with its service of the needs and interests of its community of license") (citing *Broadcast Communications, Inc.*, 97 FCC 2d 61, 63 (1984) ("renewal expectancy" awarded where there was no evidence that the licensee omitted any 'local public issues' and where there was an allegation that the licensee's programming was directed to audiences residing mostly outside its community of license")), *aff'd*, 15 FCC Rcd 14649 (2000); *Carrizo Springs, TX*, 13 FCC 760 (1998) ("ownership and programming issues are not taken into consideration in an allotment proceeding."); *Chateaugay, NY*, 9 FCC Rcd 3957, n.1 (1994) (refusing to address issue of commitment to serve community raised by a party challenging the petition because such "issues are not properly raised in an allotment proceeding.").

<sup>19</sup> *Chateaugay, NY*, 9 FCC Rcd 3957, n.1 (1994).

<sup>20</sup> *Modification of FM and TV Authorizations to Specify a New Community of License, Report and Order*, 4 FCC Rcd 4870, ¶ 24 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

<sup>21</sup> *Id.* at ¶ 25.

are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to priorities (2) and (3).<sup>22</sup>

As detailed in the *Petition*, the reallocation of WBTS from Athens to Doraville falls under allotment Priority 3 because it will bring a first local service to Doraville, while Athens will continue to be served by one commercial FM station, three noncommercial FM stations, and three AM stations. In contrast, retention of the allotment at Athens will provide Athens with an eighth service whereas Doraville will have no local services. Thus, grant of the reallocation would serve the FCC's FM allotment priorities.

The FCC already has considered Infinity's purported concerns that a blind application of the FM priority rule for first local service "would appear to allow an artificial or purely technical manipulation of the Commission's 307(b) related policies."<sup>23</sup> Indeed, the FCC has a long standing procedure designed to address these very issues – it uses the *Huntington and Faye and Richard Tuck* analysis which was designed to examine "cases involving moves from communities outside of urbanized areas to communities inside of urbanized area [sic], as defined by the U.S. Census."<sup>24</sup> If a community is deemed to be independent under the *Huntington and Tuck* analysis, the FCC affords the community a first local service preference under Priority 3 and compares the proposed allotment plan and the existing state of allotments to reach a decision. Thus, despite Infinity's arguments to the contrary, the FCC has an established procedure for determining whether a community such as Doraville deserves a first local service

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<sup>22</sup> Revision of FM Assignment Policies and Procedures, *Second Report and Order*, 90 FCC 2d 88, ¶ 7 (1982).

<sup>23</sup> Modification of FM and TV Authorizations to Specify a New Community of License, *Memorandum Opinion and Order*, 5 FCC Rcd 7094, ¶ 14. See Infinity Comments at 7.

<sup>24</sup> *East Los Angeles, Long Beach, and Frazier Park, California*, 10 FCC Rcd 2864, ¶ 21 (1995).

preference, a procedure with which Cox has complied. As Cox demonstrated in its *Petition*, under a *Huntington* and *Tuck* analysis, Doraville is independent of Atlanta and deserves the significant public interest benefit of its own first local radio service.

Further, the FCC has recently settled the question of what showings must be made when a station potentially could modify its facilities to cover more of an urbanized area after the close of an FM allotment rulemaking proceeding. In *Chillicothe*, the FCC considered the potential for a second step to relocate a station closer to an urbanized area. Due to the concern that the second step might permit the petitioner to sidestep the requirement of providing a *Tuck* analysis, the FCC required that the petitioner provide a *Tuck* analysis to demonstrate the independence of the proposed community of license.<sup>25</sup> Given that Cox already has satisfied this requirement by providing a *Tuck* showing in its *Petition* and thus has addressed any possible concerns that the FCC may have, Infinity's concerns already have been assuaged.

As described below, Infinity fails in its feeble attempts to challenge the independence of Doraville, and Doraville clearly satisfies the *Tuck* analysis for an independent community. As such, Doraville deserves a first local service preference. Under the FCC's FM allotment priorities, the reallocation of WBTS should therefore be granted because it achieves a preferential arrangement of allotments.

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<sup>25</sup> See *Chillicothe*, 2003 FCC LEXIS 6060, ¶ 5.

### **III. AS DEMONSTRATED BY COX'S *TUCK* ANALYSIS, DORAVILLE IS INDEPENDENT OF ATLANTA.**

As described in detail in Cox's *Petition*, when evaluating a community's independence, the FCC is guided by the following three factors: (1) signal population coverage, [that is, the degree to which the proposed station will provide service to both the suburban community and the larger metropolis]; (2) the size and proximity of the suburban community relative to the metropolis; and (3) the interdependence of the suburban community with the metropolis, as gauged by a number of indicia.<sup>26</sup> All three factors indicate that Doraville is entitled to a first local service preference.

#### **A. Signal Population Coverage.**

As Cox explained in its *Petition*, the current 70 dBu contour of WBTS at Athens currently covers 33% of the population and area of the Atlanta Urbanized Area.<sup>27</sup> Upon grant of the proposal, WBTS will continue to cover the same percentage of the Atlanta Urbanized Area. The FCC typically requires a *Tuck* analysis if the proposed facilities will cover 50% or more of the urbanized area or if the community is located within the urbanized area. Here, WBTS covers less than the threshold 50% and even Infinity in its imaginary scenario hypothesizes less than 50% coverage of the Atlanta Urbanized Area by WBTS.<sup>28</sup>

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<sup>26</sup> See, e.g., *Snyder, Littlefield, Wolfforth, and Floydada, Texas and Hobbs, NM*, 17 FCC Rcd 22590, ¶ 3 (2002).

<sup>27</sup> *Petition* at 6.

<sup>28</sup> Infinity Comments at 11.

## **B. Population and Proximity.**

Infinity fails to demonstrate that the population size of Doraville and the distance between Doraville and Atlanta supports a finding of interdependence. To the contrary, both of these indicia are well within the range previously found permissible. For example, the population percentage of Doraville is 2.36% that of Atlanta and the FCC has granted channel change petitions where the proposed community's population as a percentage of that of the central city was significantly smaller.<sup>29</sup> In *Chillicothe*, for example, the population of Ashville was less than one-half percent of the population of Columbus - 0.446%. In its determination that this did not support a finding of interdependence, the FCC noted that "similar population disparities have not precluded favorable consideration as a first local service."<sup>30</sup>

In addition, while Doraville is located 15 miles from Atlanta, the FCC has found many other communities to be independent where the distance between the community and the central city of the urbanized area was much shorter.<sup>31</sup> In fact, the FCC has found that College Park, which is six miles closer to Atlanta than Doraville,<sup>32</sup> is independent of the Atlanta Urbanized

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<sup>29</sup> See, e.g., *Kankakee and Park Forest, Illinois*, 16 FCC Rcd 6768 (2001) (finding Park Forest independent of Chicago despite population equal to 0.8% of that of central city); *Ada, Newcastle and Watonga, Oklahoma*, 11 FCC Rcd 16896 (1996) (finding Newcastle independent of Oklahoma City despite population equal to 0.9% of that of central city).

<sup>30</sup> *Chillicothe*, 2003 FCC LEXIS 6060, ¶ 7.

<sup>31</sup> See, e.g., *Mullins and Briarcliffe Acres, South Carolina*, 14 FCC Rcd 10516 (1999) (finding Briarcliffe independent of Myrtle Beach Urbanized Area despite only four mile separation); *Bon Air, Chester, Mechanicsville, Ruckersville, Williamsburg, and Fort Lee, Virginia*, 11 FCC Rcd 5758, ¶ 11 (1996) (finding Fort Lee independent of Petersburg Urbanized Area despite only three mile separation).

<sup>32</sup> College Park is located nine miles from Atlanta. Distance data was derived from <http://www.indo.com/distance/>.

Area.<sup>33</sup> Thus, the distance between Doraville and Atlanta does not preclude finding that Doraville is an independent community.

**C. Tuck analysis.**

As summarized below and as detailed in Cox's *Petition*, the majority of the *Tuck* factors support the conclusion that Doraville is independent of the Atlanta Urbanized Area and entitled to a first local service preference.<sup>34</sup> While Cox provided a sufficient *Tuck* showing in its initial *Petition*, Cox provides additional support herein so as to rebut Infinity's mistaken assertions that Doraville does not qualify for a first local service preference.

**1. Doraville residents consider their community to be independent.**

As described in Cox's *Petition*, Doraville is an incorporated city with a population of 9,862 persons and Doraville's community leaders and residents perceive their community as being separate from the larger Atlanta metropolitan area.<sup>35</sup> Indeed, Doraville pride is strong, and citizens of the city have taken the time to memorialize Doraville history, which dates back to 1871, in the book, *The History of Doraville*, which is enclosed as Exhibit A. Further, in addition

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<sup>33</sup> *Aniston and Ashland, Alabama and College Park, Covington, Milledgeville, and Social Circle, Georgia, Report and Order*, 15 FCC Rcd 9971 (2000), *recon. denied*, 16 FCC Rcd 3411 (2001).

<sup>34</sup> *Tuck*, 3 FCC Rcd 5374 at ¶ 36. In *Tuck*, the FCC indicated that it would determine a community's degree of interdependence with a larger urbanized area by analyzing the following factors: "(1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own local telephone book provided by the local telephone company or [its own] zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries." *Id.*

<sup>35</sup> *Petition* at 6.



to its own book, the town also has its very own song, "Doraville," by the Atlanta Rhythm Section, which is a tribute to the band's hometown.<sup>36</sup> These examples show that Doraville's residents and celebrity alumni consider their community to be independent of the Atlanta Urbanized Area and thus this factor favors a finding of independence.

**2. Doraville has its own local government and elected officials.**

As described in detail in Cox's *Petition* and undisputed by Infinity,<sup>37</sup> Doraville has its own local government and elected officials and thus this factor also favors a finding of independence.

**3. Doraville provides extensive municipal services to its residents.**

As described in Cox's *Petition*, Doraville has its own police department and its own maintenance department that provides trash removal, solid waste removal, and animal control services for the city. Doraville also provides its residents with extensive recreational services. An analysis of this factor supports a finding of independence because Doraville provides many of its own municipal services to its residents.

**4. Doraville does not have its own zip code but has its own post office.**

Although Doraville does not have its own zip code, Doraville does have its own post office.<sup>38</sup> This is consistent with a finding of independence because, for example, in the *Chillicothe* case, the FCC found that the community did not have its own zip code and telephone listings but still found that the community was independent because five of the eight *Tuck* factors

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<sup>36</sup> ATLANTA RHYTHM SECTION, *Doraville*, on BEST OF ATLANTA RHYTHM SECTION (Polygram Records 1991).

<sup>37</sup> *Petition* at 8-9.

<sup>38</sup> *Id.* at 11.

were met.<sup>39</sup> As such, Doraville's lack of its own zip code is not dispositive because Doraville meets seven of the eight *Tuck* factors for independence.

**5. Doraville has many commercial establishments and local health care resources.**

An analysis of this factor demonstrates that Doraville is independent because it has its own commercial establishments and health facilities, which are described in detail in Cox's *Petition*<sup>40</sup> and again are not disputed by Infinity.

**6. Doraville offers its residents substantial employment opportunities.**

An analysis of this factor also demonstrates Doraville's independence because the majority of community residents work in Doraville or other Metropolitan Statistical Areas other than Atlanta. As described in Cox's *Petition*, according to the 1990 census, 77% of Doraville residents over the age of sixteen worked in Doraville or other Metropolitan Statistical Areas outside of Atlanta.<sup>41</sup> This figure is substantially higher than the percentages that have been approved in other cases noting a favorable finding on this factor.<sup>42</sup> Moreover, Doraville has numerous businesses that provide employment opportunities to its residents. For example, General Motors, which has a factory in Doraville, employs over 3000 hourly and salaried

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<sup>39</sup> *Chillicothe*, 2003 FCC LEXIS 6060, ¶¶ 8-10.

<sup>40</sup> *Petition* at 11-12.

<sup>41</sup> *Id.* at 12.

<sup>42</sup> *Aniston and Ashland, Alabama and College Park, Covington, Milledgeville, and Social Circle, Georgia, Memorandum Opinion and Order*, 16 FCC Rcd 3411, ¶7 (2001) (16%); *Chillicothe*, 2003 FCC LEXIS 6060, ¶ 8 (39%).

employees<sup>43</sup> and, as Cox noted in its *Petition*, in 1990 alone, the city issued 1,500 business licenses.<sup>44</sup>

Contrary to the facts, Infinity implies that most residents of Doraville work in Atlanta solely based on a mean twenty-nine minute commute time and the presence of a subway stop and bus routes. The FCC recently dismissed the same kind of conjecture in *Chillicothe* where the Joint Petitioners also speculated that residents of Ashville did not work in the community due to a thirty-minute commute time.<sup>45</sup> Instead, the FCC relied up on the data from the 2000 U.S. Census that 39% of Ashville residents worked in the county and the fact that numerous businesses that could provide employment opportunities were located in Ashville to find that a significant number of persons worked in that community.<sup>46</sup> Similarly in this case, Infinity's speculation should be dismissed. Instead, in light of Cox's census data that 77% of Doraville residents over the age of sixteen worked in Doraville or other Metropolitan Statistical Areas and evidence that numerous businesses are located in Doraville and provide a significant percentage of its residents with employment opportunities, the FCC should find that this factor also weighs in favor of Doraville's independence.

#### **7. Doraville has local media outlets.**

Doraville meets this factor because it has its own newspaper, the *Doraville Citizen*, as well as the *North DeKalb Newspaper*, that covers the community's needs and interests.

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<sup>43</sup> See General Motors Website, Plant Summary at [http://www.gmdynamic.com/company/gmability/environment/plants/facility\\_db/facility\\_summary.php?fID=115](http://www.gmdynamic.com/company/gmability/environment/plants/facility_db/facility_summary.php?fID=115).

<sup>44</sup> *Petition* at 11.

<sup>45</sup> *Chillicothe*, 2003 FCC LEXIS 6060, ¶ 8.

<sup>46</sup> *Id.*

Infinity's argument that the existence of Doraville's own newspaper demonstrates Doraville's dependence on Atlanta is unsupported by precedent.

**8. Doraville businesses can advertise to residents directly.**

Finally, Doraville meets this factor because Doraville businesses can advertise directly to its residents in the *North DeKalb Neighbor* and through Advo, as described in Cox's *Petition*.<sup>47</sup> As described above, even in *Chillicothe*, where the FCC found that Asheville was in the same Arbitron market, Metropolitan Statistical Area and Nielsen Designated Market Area as Columbus, the FCC determined that Asheville was independent of the urbanized area because as few as five of the eight *Tuck* factors supported a determination of independence from the urbanized area. In other cases, the FCC also has noted that it bases its determination of evidence on whether the majority of *Tuck* factors or the totality of evidence demonstrates independence.<sup>48</sup> Here, Cox has demonstrated that Doraville meets seven of the eight *Tuck* factors and thus, Doraville clearly is independent from the Atlanta Urbanized Area. Accordingly, Doraville merits a first local service preference and Cox's proposal thus must be granted because it achieves a preferential arrangement of allotments.

**IV. THE FCC ALREADY HAS RULED THAT THE IMPOSITION OF CONDITIONS PROHIBITING FUTURE CHANGES IN TRANSMITTER SITE LOCATION WOULD BE CONTRARY TO THE PUBLIC INTEREST.**

If the FCC grants WBTS's proposed community change to Doraville, Infinity proposes that the FCC impose certain conditions on WBTS that would prevent it from moving its transmitter site. Specifically, Infinity states that WBTS should be required forever to provide

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<sup>47</sup> *Petition* at 13.

<sup>48</sup> See, e.g., *Parker and St. Joe, FL*, 11 FCC Rcd 1095 (1996); *Elizabeth City, NC*, and *Chesapeake, VA*, 9 FCC Rcd 3586 (1994).

city grade coverage to its former community of Athens and continue to serve Athens despite its being assigned to Doraville. Such conditions contravene public policy and the public interest.

First, if, despite WBTS being assigned to serve Doraville, the FCC were to impose a condition that WBTS continue to provide city grade coverage to its former community of Athens, WBTS would be restricted in its future ability to move its transmitter site, for whatever reason. As such, conditioning WBTS's license on the station continuing to provide city grade coverage to the community of Athens would wholly contravene the FCC's precedent that it would be contrary to the public interest to impose a permanent condition prohibiting relocation of a station's transmitter site.<sup>49</sup> As the FCC has observed, "there are valid public interest reasons for a station to relocate its transmitter site"<sup>50</sup> and such a condition would thwart these public interest benefits.

Moreover, such a dangerous precedent would deter future petitioners from proposing a change in a community of license, for fear that they too would become subject to such a restrictive condition in perpetuity. It would also set back the FCC's FM allotment policies almost fifteen years. Indeed, before 1989, petitions to amend the Table of Allotments to change a station's community of license were subject to competing expressions of interest. Recognizing that this policy of allowing competing expressions of interest was deterring stations from upgrading their facilities, in 1989, the FCC revised its rules to allow stations to propose such amendments without being subject to competing expressions of interest. The underlying policy reasons were to encourage such amendments that would achieve a preferential arrangement of allotments and "further[] the statutory goal of providing a fair, equitable, and efficient

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<sup>49</sup> *Chillicothe*, 2003 FCC LEXIS 6060, ¶ 4.

<sup>50</sup> *Id.*

distribution of facilities among the several states and communities.”<sup>51</sup> In addition, the FCC noted that the new policy “could provide licensees and permittees with greater discretion in choosing and modifying technical facilities. Specifically, by using the proposed procedure either in conjunction with a transmitter site relocation or in conjunction with the FCC’s procedures for modifying licenses to a higher class of channel in the course of rule making proceedings to amend the Tables, licensees and permittees may be able to improve their technical facilities in circumstances where they might not otherwise be able to do so. Commission policy generally favors upgrades in facilities.”<sup>52</sup> Should the FCC begin imposing conditions on stations that seek to change their community of license by restricting their future ability to change transmitter sites and requiring them to serve two communities of license, the FCC will deter licensees from proposing future upgrades and thereby significantly hamper the achievement of a fair and equitable distribution of frequencies among the communities.

Infinity mistakenly cites the WHNS(TV) decision to support its request that the FCC overturn its FM allotment precedents by requiring a station to continue serving its former community of license.<sup>53</sup> This television precedent is completely inapplicable to the case at hand because WHNS(TV) was decided under television allotment policies and did not involve a first local service priority but rather was an examination under television allotment “Priority 5.” The

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<sup>51</sup> *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, Notice of Proposed Rulemaking*, 3 FCC Rcd 6890, ¶ 7 (1988) (“Our existing policy of requiring a licensee or permittee to risk loss of its present authorization to competing applicants forecloses proposals which, based on our allotment priorities, would result in a preferred distribution of facilities.”).

<sup>52</sup> *Id.* at ¶8.

<sup>53</sup> Infinity Comments at 17, *citing Asheville, North Carolina and Greenville, South Carolina, Report and Order* in MB Docket No. 02-363, RM-10604, DA 03-2479 (rel. Aug. 1, 2003).

FCC noted that under Priority 5, the channel normally would be allotted to the community that has a larger population and therefore the FCC would have denied the community of license change.<sup>54</sup> Rather than denying the proposal, however, the FCC approved the community move under the condition that the station continue its legal and public interest obligations to its original community, to which the licensee consented.

In this case, WBTS's proposal fulfills Priority 3, first local service, and clearly provides a preferential arrangement of allotments under the FCC's FM allotment priorities. Unlike WHNS(TV), the FCC does not need to create special conditions to allow a grant of the WBTS community of license change because WBTS will provide a first local service to Doraville, which itself is a significant public interest benefit. Moreover, the FCC has acknowledged that the underlying policy considerations governing FM and TV allotments are different because "[u]nlike AM or FM radio stations, television provides 'an areawide, rather than a localized service'"<sup>55</sup> and "the Commission and the courts have recognized that such [television] channels are scarce and must serve much broader areas than the more plentiful, less powerful, radio stations which can focus narrowly on local needs."<sup>56</sup> As a result, the FCC has stated that the television service area "'should be defined in terms of coverage and not in terms of . . . political boundaries.'"<sup>57</sup> On the other hand, the FM allotment policies are designed with the intention that a radio station serves its community of license. As such, the policy differences between television and radio services mandate against the FCC's altering the meaning of a radio station

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<sup>54</sup> *Asheville, North Carolina*, DA 03-2479, ¶ 4.

<sup>55</sup> *Buena Vista Telecasters of Texas, Inc., Memorandum Opinion and Order*, 94 FCC 2d 625, ¶ 9 (1983), citing *Cleveland Television Corporation*, 91 FCC 2d 1129, ¶ 14 (1982).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

community of license change by imposing a condition that a radio station continue to serve its former community after it has been assigned a new community of license. Accordingly, Infinity's request must be denied.

## **V. CONCLUSION**

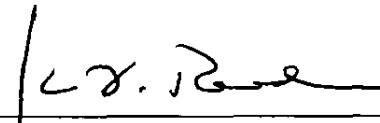
Infinity has filed a pleading that is rife with arguments that are irrelevant to the guiding considerations in FM allotment proceedings because Infinity cannot challenge Cox on those issues that matter. WBTS's proposed change in community of license would provide a first local service to Doraville and therefore must be granted under the FCC's FM allotment precedent and policies as serving the public interest.



THEREFORE, for the reasons herein and previously set forth in the *Petition*, Cox respectfully requests that the Bureau dismiss Infinity's requests and promptly adopt the reallocation of WBTS to Doraville as proposed in the *Notice*.

Respectfully Submitted,

**COX RADIO, INC.  
CXR HOLDINGS, INC.**

By:   
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Dated: November 12, 2003

## CERTIFICATE OF SERVICE

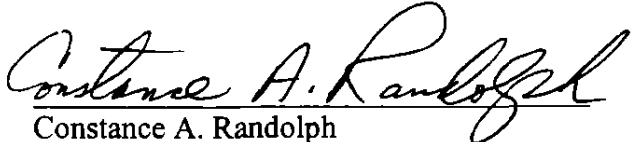
I, Constance A. Randolph, a secretary at Dow, Lohnes & Albertson, PLLC, hereby certify that a true and correct copy of the foregoing "Reply Comments of Cox Radio, Inc. and CXR Holdings, Inc." was sent on this 12th day of November, 2003, via first-class United States mail, postage pre-paid, to the following:

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## EXHIBIT A

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